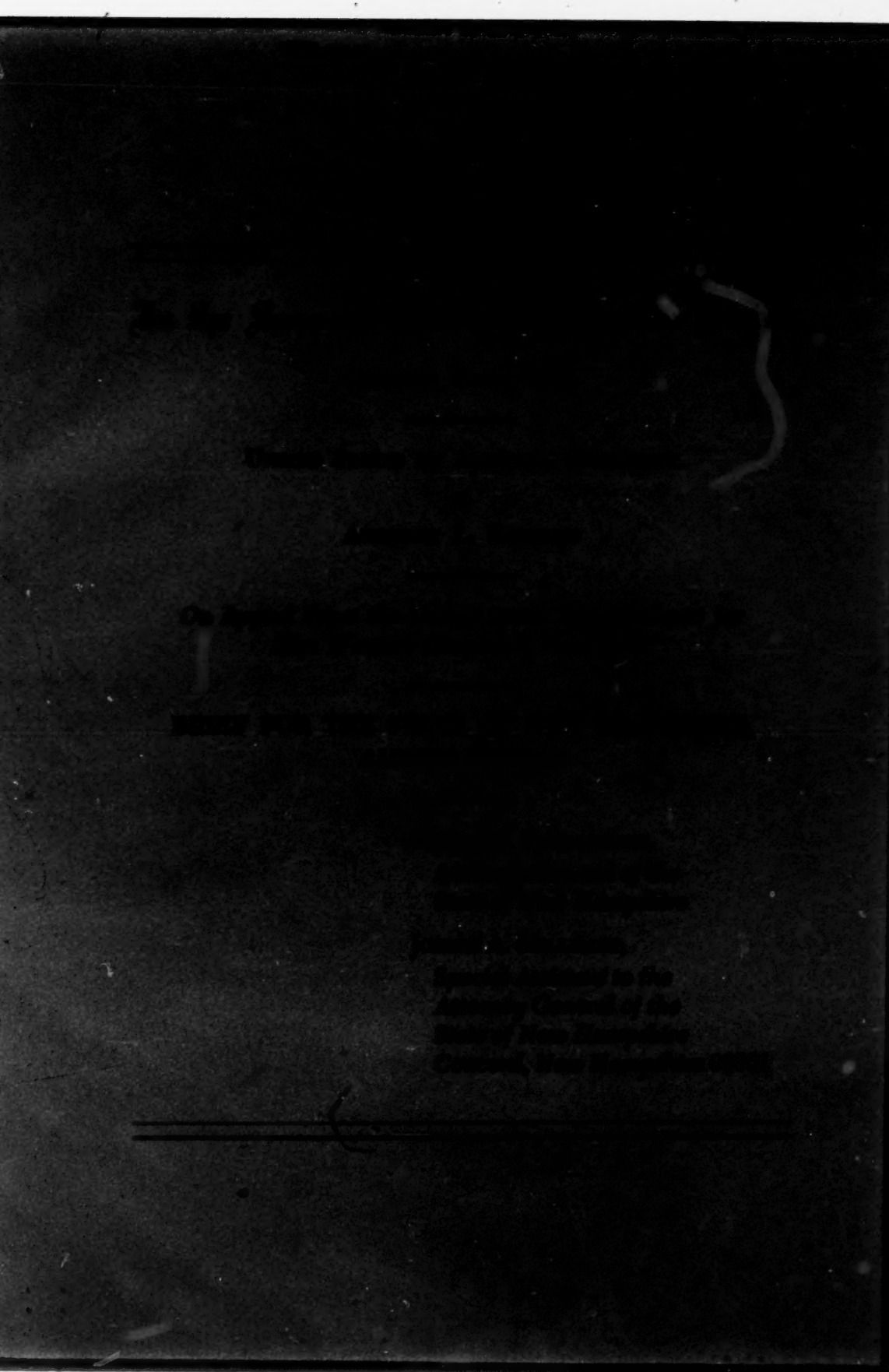

INDEX

	Page
The Interest of the *Amicus Curiae*	1
Summary of Argument	5
Argument:	
A. The Attorney General's Anti-Crime Program of 1961 applies only to illegal wagering enterprises	7
B. Congress was careful to protect innocent citizens and exempt lawful State gambling	11
C. Analysis of Section 1953 shows that it applies only to illegal wagering enterprises	14
D. There is no purpose here to assist the States in the enforcement of their criminal laws	20
Conclusion	24

CITATIONS

Cases:	
Association of Westinghouse Salaried Employees v. *Westinghouse Elec. Corp.*, 348 U.S. 437	14
Crandall v. *Nevada*, 73 U.S. (6 Wall.) 35	4
Edwards v. *California*, 314 U.S. 160	4
France v. *United States*, 164 U.S. 676	21
Francis v. *United States*, 188 U.S. 375	21
Kent v. *Dulles*, 357 U.S. 116	4
Lottery Case, 188 U.S. 321	3
Russell v. *United States*, 369 U.S. 749	20
Stirone v. *United States*, 361 U.S. 212	20
Travis v. *Yale & Towne Mfg. Co.*, 252 U.S. 60	4
United States v. *Carbone*, 327 U.S. 633	14
United States v. *Kahriger*, 345 U.S. 22	4, 5
Williams v. *Fears*, 179 U.S. 270	4
State v. *Kachadoorian*, 104 N.H. 29, 177 A. 2d 398	20
United States v. *Baker*, 241 F. Supp. 272, *aff'd* Nos. 15572 and 15573, C.A. 3, decided July 28, 1966	18
United States v. *Bergland*, 318 F. 2d 159, *cert. denied* 375 U.S. 861	14

PAGE

United States Constitution and Statutes

U.S. Const. art. IV, § 9 4
U.S. Const. amend. XIV, § 1 4
15 U.S.C. 1171 12
15 U.S.C. 1172 12
18 U.S.C. 1084 ..... 12, 13, 14
18 U.S.C. 1301 ..... 15, 16, 17, 18, 21
18 U.S.C. 1952 ..... 5, 10, 14
18 U.S.C. 1953 ..... 2, 5, 6, 7, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 23, 24
26 U.S.C. 4401 5
26 U.S.C. 4402 5
26 U.S.C. 4403 5
26 U.S.C. 4411 5

State Statutes

N.Y. Penal Law § 1373 21
N.H. Rev. Stat. Ann. § 284: 21-a 2
N.H. Rev. Stat. Ann. § 284: 21-h 2, 23
N.H. Rev. Stat. Ann. § 284: 21-i 2
N.H. Rev. Stat. Ann. § 284: 21-o 23

Miscellaneous:

50 AM. JUR. *Statutes* §§ 458-462 21
Atlantic Monthly, November 1960 11
Atlantic Monthly, April 1962 11
Christian Century, May 26, 1965 11
Commonwealth of Massachusetts Public Document No. 12, *Report of Attorney General for Year Ending June 30, 1965* 22
107 Cong. Rec. 13902 13
107 Cong. Rec. 13945 12
107 Cong. Rec. 16538 ..... 13, 14
Ezell, *Fortune's Merry Wheel*, Harvard, 1960 ..... 3, 15
Hearings on H.R. 468, 1246, 3021, 3022, 3023, 3246, 5230, 6571, 6572, 6909, 7039 before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess. 7, 8, 9, 12, 16, 17
Hearings on S. 1653, 1654, 1655, 1656, 1657, 1658, 1665 before the Senate Committee on the Judiciary, 87th Cong., 1st Sess. 5, 7, 8, 10, 11, 14, 16

PAGE

Miscellaneous—Continued

H.R. 3246, 87th Cong., 1st Sess. 16
H.R. 6571, 87th Cong., 1st Sess. 9, 12, 13, 16, 17
H. Rep. No. 967, 87th Cong. 1st Sess. 13
New Hampshire Sweepstakes Commission, *New Hampshire Sweepstakes, An Aid to Education* (1965) 2, 3
News Release, New Hampshire Sweepstakes Commission, September 22, 1966 ..... 1, 22
N.Y. Times, Sept. 14, 1966 ..... 4, 21
S. 527, 87th Cong., 1st Sess. 16
S. 1653, 87th Cong., 1st Sess. 5, 10
S. 1656, 87th Cong., 1st Sess. 12
S. 1657, 87th Cong., 1st Sess. 10, 12, 13, 16
S. 1658, 87th Cong., 1st Sess. 12
S. Rep. No. 588, 87th Cong., 1st Sess. 13
United States Department of Justice, *Bulletin of Instructions to United States Attorneys* 19
Webster's Third New International Dictionary (1964) 18

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 47

UNITED STATES OF AMERICA, APPELLANT

v.

ANTHONY L. FABRIZIO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE STATE OF NEW HAMPSHIRE, *AMICUS CURIAE*

THE INTEREST OF THE *AMICUS CURIAE*

The State of New Hampshire is vitally concerned in the outcome of this case. Although accurate statistics are not available, the distribution of prize winners among 41 States, the District of Columbia, and 7 foreign countries, indicates that a great many New Hampshire Sweepstakes tickets are purchased by tourists on their visits to New Hampshire.[1] All of the purchasers receive an acknowledgement of purchase similar to the acknowledgements which form the basis of the indictment in this case. If a purchaser can be indicted for a federal crime merely because he transports a New Hampshire Sweepstakes acknowledgement of purchase in interstate or foreign com-

[1] News Release, New Hampshire Sweepstakes Commission, September 22, 1966.

merce, then New Hampshire's fiscal experiment in attempting to raise money for education by its modest Sweepstakes Program is seriously threatened. It is the position of the State of New Hampshire that such a result was never the intention of Congress when it enacted 18 U.S.C. 1953 or any of the other anti-crime statutes passed by the 87th Congress.

The New Hampshire Sweepstakes Program is the only lottery in American history specifically designed to avoid conflict with federal law and the laws of other States. This has been accomplished by three salutary rules, one statutory and two administrative in origin.

By statute (N. H. Rev. Stat. Ann. 284:21-h), sweepstakes tickets may be sold only at specified, closely-controlled locations within the State. Except for sales at the two State-licensed race tracks, all sweepstakes tickets are sold on State-owned and operated premises. Sales at the tracks are by State employees only.[2] By administrative order of the Sweepstakes Commission,[3] no tickets are sold in blank; each must bear the name and address of the owner. All tickets are retained in the possession of the Sweepstakes Commission; only an acknowledgement of purchase is delivered to the purchaser.[4] Payment is made to the owner whose name is registered on the original ticket by deposit in a New Hampshire bank or by delivery of a State

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[2] See New Hampshire Sweepstakes Commission, *New Hampshire Sweepstakes Program, An Aid to Education*, 4 (1965). Cited hereinafter as *New Hampshire Sweepstakes Program.*

[3] The statute (N. H. Rev. Stat. Ann. 284:21-a, i) created a three-member commission and gave the commission full authority "to make rules and regulations for the holding and conducting of such sweepstakes races, and the sales of tickets thereon . . ."

[4] *New Hampshire Sweepstakes Program*, 4.

check delivered to the winners within the State of New Hampshire.[5]

The Commission also has strict internal controls. All tickets are dispensed from specially-designed machines. They are collected daily, deposited with banks in various parts of the State, and ultimately deposited in a clearing house bank vault in Manchester, which keeps track of them by computer and electronic data-processing equipment.[6]

The tightly-controlled system run by the Sweepstakes Commission insures the integrity of the program and guarantees avoidance of the abuses of past lotteries.[7] For example, it is impossible to run an illegal insurance or policy lottery on the New Hampshire Sweepstakes because numbers are not used in selecting New Hampshire Sweepstakes winners. Since the acknowledgements of purchase are not transferrable or assignable, and because they cannot be exchanged for a prize, New Hampshire Sweepstakes chances cannot be re-sold or delivered as "an interest in a lottery" to persons in other States.

The New Hampshire Sweepstakes Program precludes violation of either federal law or the law of other States by requiring that all essential steps in the act of gambling take place within the State of New Hampshire. It recognizes and follows the precept that gambling is a form of social activity ordinarily beyond the control of the Federal Government, and subject to control within each State by the respective State governments.[8] New

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[5] *Id.* at 8.

[6] *Id.* at 7.

[7] Ezell, *Fortune's Merry Wheel*, 243-269 (1960).

[8] *Lottery Case*, 188 U.S. 321, 357, where the court said, "Congress, by that act [now 18 U.S.C. 1301], does not assume to interfere with traffic or commerce in lottery tickets carried on exclusively within the limits of

Hampshire has as much constitutional power to permit gambling within its borders as New York has to prohibit it.[9] But neither New York nor the Federal Government has the power to prohibit free travel to New Hampshire by any citizen of the United States for the purpose of engaging in any activity which is lawful in New Hampshire.

The right to move freely from State to State is a right of national citizenship, protected by the privileges and immunities clause of the Fourteenth Amendment against State interference. See *Edwards* v. *California*, 314 U.S. 160, 181. Cf. *Kent* v. *Dulles*, 357 U.S. 116. Similarly, the words "privileges and immunities" in the Federal Constitution, Article IV, Section 2, are words of very comprehensive meaning, and the clause in which they are contained secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade and business, without molestation. *Travis* v. *Yale & Towne Mfg. Co.*, 252 U.S. 60. The right to move from one place to another according to inclination is an attribute of personal liberty, and the right of free transit from or through the territory of any State is a right secured by the Fourteenth Amendment. *Williams* v. *Fears*, 179 U.S. 270. Cf. *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35. The Government recognizes that the New Hampshire Sweepstakes Program is lawfully operated and no one has suggested that citizens may not travel to New Hampshire to buy tickets.[10]

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any state, but has in view only commerce of that kind among the several states." *United States* v. *Kahriger*, 345 U.S. 22.

[9] It is noteworthy that New York is approaching its final referendum to legalize a New Hampshire type of sweepstakes in that state. N. Y. Times, Sept. 14, 1966, p. 1, col. 1. (City ed.).

[10] Attorney General Kennedy, testifying before the Senate Judiciary

The Congress has recognized and approved the integrity of the New Hampshire Program. The 89th Congress added a special subsection to the Wagering Tax statute, exempting State-operated sweepstakes races from the tax[11] retroactively to March 10, 1964,[12] the date the people of New Hampshire, by popular referendum, approved the sale of sweepstakes tickets. This had the additional effect of excusing all Sweepstakes salesmen from purchasing the $50.00 tax stamp and from keeping regulatory records required of gamblers.[13] The wagering tax has been held to have a purpose to suppress illegal wagering.[14] The willingness of Congress to treat the New Hampshire Sweepstakes on a par with pari-mutuels is inconsistent with any contention that the New Hampshire Program is covered by 18 U.S.C. 1953. And the fact that Congress took no action with regard to Section 1953 merely raises the inference that none was thought necessary.

SUMMARY OF ARGUMENT

It is the position of the State of New Hampshire that the special safeguards inherent in the New Hampshire Sweepstakes

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Committee on S. 1653 (now 18 U.S.C. 1952), said: "Let me say from the outset that we do not seek or intend to impede the travel of anyone except persons engaged in illegal businesses as spelled out in the bill . . . The target clearly is organized crime. The travel that would be banned is travel 'in furtherance of a business enterprise' . . . Obviously, we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise." *Senate Hearings*, pp. 15-16.

[11] P.L. 89-44 §813(a), amending 26 U.S.C. 4402.

[12] *New Hampshire Sweepstakes Program*, 3.

[13] It put the New Hampshire Sweepstakes on a par with pari-mutuel wagering. 18 U.S.C. 4401, 4402, 4403, 4411.

[14] *United States* v. *Kahriger*, 345 U.S. 22, 28.

Program preclude violation of 18 U.S.C. 1953 (or of any other federal statute) unless it is shown that carriage of the allegedly offensive papers in interstate commerce is part of an illegal wagering enterprise regularly conducted outside the scope of the New Hampshire Sweepstakes. Since the present indictment is based upon a single instance of carrying acknowledgements from Keene, New Hampshire to Elmira, New York, and there is no allegation of a continuing enterprise, the charge does not fall within the purview of the statute. Inasmuch as the purpose of the statute is to deny the channels of interstate commerce to the operators of illegal wagering enterprises, casual violations of the statute such as the carrying by bettors in interstate commerce of notations of wagers placed with a bookmaker, or even the carrying of sweepstakes *tickets* by persons traveling in interstate commerce, are not covered by the statute.

Cases involving carriage of New Hampshire Sweepstakes acknowledgements are unique and require special evidence before the Government can claim a violation of the 1961 Racketeering Laws, because there can be no presumption of the operation of an illegal wagering enterprise merely from possession of acknowledgements of an act of gambling which occurred lawfully in the State of New Hampshire. The Government, in its brief, recognizes the limited purpose of Section 1953 and now claims a right under this indictment to prove that appellee was engaged in the business of purchasing sweepstakes tickets for a fee. No such claim was made below. No reference to a business or a continuing course of conduct is contained either in the indictment or in the Government's bill of particulars. The indictment does not charge a crime because it omits an essential element necessary to prove a crime under 18 U.S.C. 1953, viz., that the appellee was engaged in an illegal wagering enterprise.

The statutory history of 18 U.S.C. 1953 must be read against the background of the entire anti-crime program enacted by the 87th Congress at the behest of Attorney General Robert Kennedy. Mr. Kennedy's purpose was to attack organized crime by cutting off its access to the huge sums of money involved in illicit gambling. In responding to General Kennedy's request, the Congress insured the protection of innocent citizens and social bettors by amending the original bills to permit those gambling activities which are lawful in the various States and which do not aid the nefarious activities of the racketeers.

The New Hampshire Sweepstakes Program by its very statutory nature is not and cannot be made a part of the activities of organized crime in the United States.

ARGUMENT

A. THE ATTORNEY GENERAL'S ANTI-CRIME PROGRAM OF 1961 APPLIES ONLY TO ILLEGAL WAGERING ENTERPRISES

Section 1953, 18 U.S.C., applies only in cases involving illegal wagering enterprises. Section 1953 was enacted as part of an overall revision of federal legislation pertaining to racketeering in 1961 by the 87th Congress. The legislation was considered by the United States Senate under the title "The Attorney General's Program to Curb Organized Crime and Racketeering", and by the House of Representatives under the caption "Legislation Relating to Organized Crime".[15] The Attorney General

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[15] See *Hearings Before the Senate Committee on the Judiciary*, 87th Cong., 1st Sess., pp. 1-329, and *Hearings Before Subcommittee No. 5 of the House Committee on the Judiciary*, 87th Cong., 1st Sess., pp. 1-388. The Senate Bills were designated S. 1653, S. 1654, S. 1655, S. 1656, S. 1657, S. 1658 and S. 1665. The House Bills, which included some in addition to the Attorney General's bills, were H.R. 648, H.R. 1246,

himself testified at great length before both the Senate and the House Committees.[16] Mr. Kennedy stated the purpose and scope of the legislation succinctly: "Our package of bills is designed to prohibit the use of interstate facilities for the conduct of the many unlawful enterprises which make up organized crime today."[17]

After stating, "I now would like to discuss these bills in some general terms," Mr. Kennedy made the following comments to illustrate his contention that action was necessary to curb illegal gambling enterprises.

> "Organized crime is nourished by a number of activities, but the primary source of its growth is illicit gambling."[18]
>
> "It is quite evident that modern, organized, commercial gambling operations are so completely intertwined with the Nation's communications systems that denial of their use to the gambling fraternity would be a mortal blow to their operations."[19]
>
> "The word 'organized' is quoted because it should be clear that the Federal Government is not undertaking the almost impossible task of dealing with all the many forms of casual or social wagering which so often may be effected over communication facilities."[20]
>
> "Another area of gambling which needs attention, if we are to make a coordinated and successful attack on or-

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H.R. 3021, H.R. 3022, H.R. 3023, H.R. 3246, H.R. 5230, H.R. 6571, H.R. 6572, H.R. 6909, and H.R. 7039.

[16] *Senate Hearings*, pp. 1-18. *House Hearings*, pp. 18-47.

[17] *House Hearings*, p. 20. *Senate Hearings*, p. 2.

[18] *House Hearings*, p. 20.

[19] *House Hearings*, p. 25, referring to H.R. 7039 (now 18 U.S.C. 1084).

[20] *House Hearings*, p. 26, *re* H.R. 7039.

ganized crime, is the easy interstate transportation of wagering paraphernalia. . . . That problem is the subject of H.R. 6571."[21] (H.R. 6571 as amended became 18 U.S.C. 1953 under which this indictment is brought).

Mr. Kennedy also placed in the record a statement from J. Edgar Hoover, of the FBI, which referred to the Attorney General's "Legislative Program as to Interstate Crime" and recommended the legislation as designed to provide "effective weapons in stamping out the evil of organized crime" so that the Government could proceed "against the well-entrenched interstate racketeers."[22]

In the Senate, Mr. Kennedy testified:

"But rather than repeat that testimony, I would like today to discuss the thinking of the Department of Justice with respect to the overall effect of our proposals. The danger which faces our country today from organized crime is acute. . . . The need for action is clear and the question is what should be done and what can be done effectively to control these hoodlums and racketeers who have become so rich and so powerful. . . .

"Mr. Chairman, our legislation is mainly concerned with effectively curtailing gambling operations. And we do this, Mr. Chairman, because profits from illegal gambling are huge and they are the primary sources of the funds which finance organized crime, all throughout the country.

"It is very important that everyone realize that the Federal Government has a responsibility to use its interstate power or its taxing power to move against organized crime. . . .

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[21] *House Hearings*, p. 29.

[22] *House Hearings*, pp. 31-32.

"I wish to emphasize, Mr. Chairman, that we do not seek to preempt the field of enforcement or interfere in any way with the traditional responsibilities of local law enforcement. . . .

"We would be shirking our responsibility to Congress if we did not come before you and point out that there are three specific areas which Congress can deny to organized crime. These areas are interstate travel, interstate commerce, and interstate communication. As I pointed out, they are a vitally necessary part of organized crime. Deny organized crime the use of interstate communications and free movement in interstate travel and interstate commerce, and you strike a heavy blow for law and order. The Congress can do this.

"The bills which we have proposed are (1) . . ., (2) . . ., (3) S. 1657, (4) . . ., (5) . . ., (6) . . ., (7) . . . .

"As I have said, . . . the gamblers need paraphernalia and equipment to conduct their businesses. They are organized on an interstate basis. They need rapid communications. They need the facilities of interstate travel."[23]

Referring to S. 1653 (now 18 U.S.C. 1952), the Attorney General said:

"Let me say from the outset that we do not seek or intend to impede the travel of anyone except persons engaged in illegal businesses as spelled out in the bill. . . .

"The target clearly is organized crime. . . . Obviously, we are not trying to curtail the sporadic, casual involvement in these offenses, but rather a continuous course of conduct sufficient for it to be termed a business enterprise."[24]

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[23] *Senate Hearings*, pp. 11-12.

[24] *Senate Hearings*, pp. 15-16.

Referring to his entire package of legislation, the Attorney General said:

> "These bills carefully limit the activities of the Federal Government to the most important and the most dangerous problems now facing law enforcement. . . .
>
> *"American citizens who are not connected with organized gambling and organized crime have nothing to fear from these bills. The only toes tread on here are those of the racketeers and hoodlums".*[25]

In view of this history of the purpose of these bills, the State of New Hampshire cannot help but be offended. The only continuous course of conduct involved here, the only gambling enterprise at which the federal finger points, is the New Hampshire Sweepstakes Program.

B. CONGRESS WAS CAREFUL TO PROTECT INNOCENT CITIZENS AND EXEMPT LAWFUL STATE GAMBLING

There are two social theories underlying legislation about gambling. One is that gambling is evil *per se* and should be prohibited. Peterson, "A Look at Legalized Gambling", *Christian Century,* May 26, 1965. The other is that gambling itself is neutral from a moral point of view, but can become bad when control of gambling falls into the hands of racketeers. Murtagh, "Gambling and Police Corruption", *Atlantic Monthly,* November 1960; Kennedy, "The Baleful Influence of Gambling", *Atlantic Monthly,* April 1962. All federal gambling legislation recognizes that gambling is morally neutral and that the States may lawfully permit gambling within their own borders. The New Hampshire Sweepstakes Program confines the act of gambling entirely within the borders of New Hampshire.

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[25] *Senate Hearings,* p. 17. (Emphasis added.)

In enacting the 1961 anti-crime program, Congress was even more solicitous than was the Attorney General to protect the rights of ordinary American citizens and to confine this legislation to racketeers and hoodlums.

The three major bills dealing directly with gambling were H.R. 6571 (S.1657, now 18 U.S.C. 1953), H.R. 7039 (S.1656, now 18 U.S.C. 1084),[26] and S.1658 (now 15 U.S.C. 1171-1172).

Not one of these original bills granted any exception or exemption for lawful State operations in the nature of gambling. Congress amended every one of these measures to exempt all known State-legalized gambling existing at the time.

S. 1658 (15 U.S.C. 1172) was amended to exempt betting machines shipped to States or subdivisions of States where gambling establishments were licensed under State law, and furthermore, the States were authorized to enact statutes exempting themselves from the prohibition against shipping gambling machines in interstate commerce. See 107 Cong. Rec. 13945, and Historical Note 15 U.S.C.A. 1172, p. 243. It should also be noted that these amendments exempting certain States *liberalized* the pre-existing statute which had been on the books for ten years.

S. 1656 (H.R. 7039) was proposed as an addition to 18 U.S.C., Ch. 50, "Gambling". In its original form as drafted by the Department of Justice, the bill provided severe criminal penalties for furnishing or maintaining a wire facility or using such a facility to transmit bets or wagers interstate. Both the wire services and the customers were covered.[27] Congress exempted the wire services entirely. They confined the statute

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[26] *House Hearings*, p. 18.

[27] *House Hearings*, p. 18.

to those "engaged in the business of betting or wagering", thus exempting the social bettor entirely. And the Congress also excluded the transmission of wagering information "from a state where betting on that sporting event or contest is legal, into a state in which such betting is legal." (See 18 U.S.C. 1084, H. Rep. No. 967 and S. Rep. No. 588, 87th Congress, 1st Sess.)

H.R. 6571 (now 18 U.S.C. 1953, the basis for this indictment) was amended by the Judiciary Committee of the Senate to exempt pari-mutuel betting equipment, pari-mutuel tickets where legally acquired, or pari-mutuel materials used or designed for use where betting is legal under applicable State law. It was further amended on the floor of the Senate by the addition of an exemption for the transportation of betting materials to be used in the placing of bets or wagers on a sporting event into a state in which such betting is legal under the statutes of that state. See 107 Cong. Rec. 13902.

On the floor of the House, after praising the purpose to deny financial help to the "octopuslike activities of the commercialized racketeers", Congressman Cahill justifiably concluded in speaking about S. 1657 (now Section 1953):

> "There are sufficient exemptions in the bill, I think, to permit those activities which are legal in the States and protection has been extended to those activities which are not designed to aid in the nefarious activities of the racketeers of the country." (107 Cong. Rec. 16538).[28]

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[28] S. 1657 (now Section 1953) was described by Congressman McCulloch as follows: "S. 1657 will make it unlawful to transport in interstate commerce the paraphernalia and material which is used by professional bookmakers and numbers men. There is a special exemption for pari-mutuel betting equipment and betting materials transported into states in which the use of such materials is legal. The coverage of this

To which Attorney General Kennedy could say "Amen", since that was all he had requested.[29]

All of this legislative history is essential to determine the meaning of 18 U.S.C. 1953. *Association of Westinghouse Salaried Employees* v. *Westinghouse Elec. Corp.*, 348 U.S. 437. "Not every person or act which falls within the literal sweep of the language [of a criminal statute] necessarily comes within its intent and purpose. That language must be read and applied in the light of the evils which gave rise to the statute and the aims which the proponents sought to achieve. When that is done, the inapplicability of the act to the facts set forth in the indictment becomes clear." *United States* v. *Carbone*, 327 U.S. 633, 637.

In a case involving indictments under other aspects of the Attorney General's anti-crime program of 1961 (18 U.S.C. 1084 and 1952), it has been determined that the statutes require interpretation by the use of legislative history, and that the history plainly establishes an intent to prohibit interstate travel in aid of racketeering enterprises. See *United States* v. *Bergland*, 318 F. 2d 159 (C.A. 7), *cert. denied*, 375 U.S. 861.

"The interpretive process would be abused and the legislative will subverted were we to deal with the broad language of this statute in disregard of the narrow problem . . . which Congress sought to remedy." *Carbone, supra* at 641-2.

C. ANALYSIS OF SECTION 1953 SHOWS THAT IT APPLIES ONLY TO ILLEGAL WAGERING ENTERPRISES

Appellant's analysis of Section 1953 is erroneous. It ignores the overriding and dominant purpose of all the 1961 legisla-

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bill is directed at the shipment in interstate commerce of material which will be used to violate state and local law." 107 Cong. Rec. 16538.

[29] *Senate Hearings*, p. 13.

tion stemming from the Attorney General's program to cover only illegal gambling enterprises. What is more, the appellant's analysis misconstrues the meaning of the words used in the section.

The indictment in this case and the appellant's brief both treat Section 1953 as though it were an amendment to 18 U.S.C. 1301. The Government's Brief suggests that "the purpose of the bill was to extend the long-established prohibition against interstate transportation of lottery tickets to all gambling papers adapted for use in connection with a lottery or sporting event" (p. 13). It also urges that Section 1953 "is designed to close the most important loophole resulting from" certain decisions of this Court (p. 17). Neither of these suggestions is sound. Section 1301 was the by-product of the infamous Louisiana Lottery which was privately operated under a license from the State of Louisiana but which flooded the nation with hundreds of thousands of lottery tickets. There were drawings every month and tickets were sold in offices in almost every State as the operators openly flaunted the laws of other States. The proprietors became the dominant factor in the political life of Louisiana and the operation was so huge that by 1890, 45 percent of all the business of the New Orleans Post Office concerned the lottery.[30]

Nevertheless, despite the national outcry over the abuses of the Louisiana Lottery, Congressional action did not go beyond the specific evil to be corrected and the courts, in construing the 1895 statute, have recognized its limitations. Section 1301 merely prohibits carriage in interstate commerce of "any paper or instrument purporting to be or represent a ticket, chance, share or interest in a lottery." Whatever deficiencies existed

[30] Ezell, *Fortune's Merry Wheel*, 249-259 (1960).

in Section 1301 before Section 1953 was enacted are still there. But neither is the admitted purpose of Section 1301 to cover state licensed lotteries imported into the purpose of Section 1953. The two statutes are simply aimed at different evils; Section 1953 does not amend or replace Section 1301.

This is demonstrated most simply by the fact that Section 1953 is part of an entirely different chapter of the Code. Section 1301 is part of a special chapter dealing only with "Lotteries". (18 U.S.C., Ch. 61). Section 1953 is part of a special chapter dealing only with "Racketeering". (18 U.S.C., Ch. 95).

This is consonant with the entire background of the Attorney General's anti-crime program. It is also the only conclusion consistent with a careful analysis of Section 1953 itself.

H.R. 6571 (S. 1657) was not the original bill which the Department of Justice introduced on this subject. Attorney General Rogers had sponsored a bill designated H.R. 3246 (printed at p. 8, *House Hearings*) and S. 527. The generic concept of "wagering paraphernalia" as equipment and supplies to carry on an illegal gambling enterprise was not altered by the additional words used to describe the kinds of materials within the statutory idea of "paraphernalia". H.R. 3246 merely proscribed interstate carriage of "any records or paraphernalia" used in bookmaking, wagering pools and the numbers racket. This necessarily implied that the offensive materials were part of a gambling enterprise of the three listed types, and that such enterprise be part of a continuing, illegal course of conduct.[31]

Assistant Attorney General Miller (on whose Senate testimony appellant relies in its Brief, p. 11) was much more illuminating before the House Subcommittee:

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[31] *Senate Hearings*, pp. 289-291.

"The next bill that I would like the subcommittee to consider is H.R. 6571, which proscribes the interstate transportation of wagering paraphernalia.

"This bill is one aspect of the Department's intensive attack on organized gambling, which supplies the bankroll for all the other multi-state criminal activities which tax the American people to the tune of $22 billion a year. Our records indicate that the three most prevalent types of gambling involve bookmaking, wagering pools on sporting events, and the so-called numbers racket. H.R. 6571 is directed specifically at the interstate transmission of various kinds of paraphernalia used in these three forms of gambling. . . .

"H.R. 6571 applies to—

any records, paraphernalia, ticket, certificate, bill, slip, token, paper, writing or other devise used, or to be used, or adapted, devised, or designed for use—

in these three enumerated areas of gambling. Such all-inclusive language is necessary in an attempt to cover all of the equipment or paraphernalia which will inevitably be devised by organized racketeers in an effort to avoid the sanctions of this bill. In addition, the restrictive judicial interpretations which vitiated the Anti-Lottery Act at an early date suggest that the bill should be broadly drafted in order to declare the legislative goal with sufficiently inclusive language."[32]

In short, Mr. Miller frankly stated they were only aiming at multi-state criminal activities and that the breadth of language was chosen because of their experience with the Anti-Lottery law (Section 1301), not because Section 1953 was intended

[32] *House Hearings*, pp. 350-351.

to reach the type of activity proscribed by Section 1301. What Section 1953 was designed to do was to shut off the supply of wagering paraphernalia which was being shipped into various states for the conduct of the specified types of wagering enterprises. By expanding the description of the proscribed articles, the bill did not intend to abandon the concept of prohibiting acquisition of equipment and supplies by gambling enterprises. The addition of the words "ticket, certificate, bill, slip, token, paper, writing or other device" simply obviated the possibility that the statute would cover only "equipment" (the dictionary meaning of "paraphernalia")[33] and insured that supplies also would be prohibited.

The acknowledgements of purchase of New Hampshire Sweepstakes tickets may fall within the descriptive language of Section 1953, but once they pass into the hands of a purchaser, they are no longer part of the wagering enterprise. They need not be surrendered to claim a prize because the basis for payment in New Hampshire is the name and address on the ticket retained by the Sweepstakes Commission. In the hands of the purchaser, the acknowledgements are no part of the supplies or equipment by which the lottery is conducted. Therefore, they are not statutory "paraphernalia" within the meaning of Section 1953.[34]

The Government recognizes this limitation explicitly in its instructions to U. S. Attorneys concerning administration of the statute:

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[33] Webster's Third New International Dictionary, (1964).

[34] Cf. *United States* v. *Baker*, 241 F. Supp. 272 (M. D. Pa. 1965), *aff'd*, Nos. 15572 and 15573, C. A. 3, decided July 28, 1966, where the shipments involved 30,000 books of sweepstakes tickets, constituting a substantial quantity of the materials necessary for the operation of a lottery.

"... It will be seen from the analysis below that Section 1953 specifically avoids these restrictive interpretations and is made to relate to wagering paraphernalia which is used or to be used, or adapted, or devised, or designed for use in certain wagering activity. In view of this it is anticipated that there will be reports of casual violations of the statute, such as the carrying by bettors in interstate transportation of notations of wagers placed with a bookmaker or the carrying of sweepstakes tickets by persons travelling in interstate commerce. Inasmuch as the purpose of this statute is to deny the channels of interstate commerce to the operators of illegal wagering enterprises, prosecution of the casual violator of this statute, except under the most exceptional circumstances, would serve neither the ends of justice nor the specific objective of the statute. Accordingly, investigative and prosecutive emphasis will be placed on the operators of wagering enterprises, their employees and their suppliers."[35]

The appellee here is neither an operator, an employee nor a supplier of the New Hampshire Sweepstakes. Carriage by him of acknowledgements did not constitute any part of the New Hampshire Sweepstakes. The Sweepstakes takes place entirely within the State of New Hampshire and nothing the purchasers of New Hampshire Sweepstakes tickets do with their acknowledgements furthers the enterprise in any way.

The Government apparently recognizes the force of this argument, for they now impliedly admit that they must show that appellee was engaged in the business of operating an interstate gambling business of his own by undertaking to pur-

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[35] Bulletin of Instructions to U.S. Attorneys, distributed by the Department of Justice.

chase tickets in New Hampshire for a fee.[36] It is at least doubtful that such conduct would constitute conduct of a wagering enterprise rather than the rendering of a service.[37] But this question need not be decided since that was not what appellee was indicted for.

Appellant also recognizes that it must prove not only that the papers transported were within the language of Section 1953, but also that their interstate carriage facilitated illicit wagering.[38] But no such allegation appears either in the indictment or the Bill of Particulars below. It is necessary to charge in the indictment that which must be proved to convict. "A court cannot permit a defendant to be tried on charges that are not made in the indictment against him". *Stirone* v. *United States*, 361 U.S. 212, 217. Cf. *Russell* v. *United States*, 369 U.S. 749, 764: "Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute."

D. THERE IS NO PURPOSE HERE TO ASSIST THE STATES IN THE ENFORCEMENT OF THEIR CRIMINAL LAWS.

The Government admits that it is lawful for anyone to travel to New Hampshire to purchase sweepstakes tickets. There is no charge here that appellee violated the laws of New York by purchasing New Hampshire Sweepstakes tickets or by possessing the acknowledgements of purchase in New York. The indictment charges that the mere carriage in interstate commerce of the acknowledgements of purchase constituted a violation of 18 U.S.C. 1953.

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[36] Brief for the United States, pp. 18-19.

[37] See *State* v. *Kachadoorian*, 104 N. H. 29, 177 A. 2d 398.

[38] Brief for the United States, p. 16.

Public Law 87-218 (18 U.S.C. 1953) states a dual purpose: "To provide means for the Federal Government to combat interstate crime and to assist the States in the enforcement of their criminal laws." Though no such claim was made below, the Government now seeks to bolster its position by arguing a potential violation of New York law. (Brief, p. 19). The argument will not stand analysis.

The New York lottery statute (N.Y. Penal Law §1373) is modeled after 18 U.S.C. 1301. It prohibits the sale or transfer of "any paper, certificate, or instrument, purporting to be or to represent a ticket, chance, share or interest . . ." in a lottery. These are the identical words of Section 1301 which were interpreted in *France* v. *United States*, 164 U.S. 676, and *Francis* v. *United States*, 188 U.S. 375, to apply only to papers which could be exchanged for a prize. Under familiar principles of statutory construction, the cases of this Court would be persuasive where, as here, there are no New York cases. No violation of New York law is involved.[39]

As a matter of comity and in order to assist other States in the administration of their own laws, the New Hampshire Sweepstakes Commission furnished to the Attorneys General of all northeastern States, on April 11, 1964, a copy of the New Hampshire Statute and a digest of the administrative rulings setting up the New Hampshire Sweepstakes Program.[40] In view of the impending referendum to authorize a sweepstakes program in New York,[41] it is not surprising that the Attorney

[39] See 50 AM. JUR. *Statutes* §458-462, and New York Penal Law (Annotated) §1373.

[40] Letter with enclosures to Attorneys General of Maine, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Maryland and Delaware, dated April 11, 1964.

[41] N. Y. Times, Sept. 14, 1966, p. 1, col. 1 (City ed.).

General of New York has made no official ruling governing application of New York law to the New Hampshire acknowledgements of purchase. In Massachusetts (whose residents purchase more tickets than those of any other State).[42] Attorney General Brooke has ruled that possession of New Hampshire Sweepstakes acknowledgements by Massachusetts citizens violates no Massachusetts law.[43] Only if a professional gambler or bookmaker engages in the business of registering "such wagers" is the law of the Commonwealth violated.[44]

This Massachusetts ruling is consistent with the purpose of

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[42] Consolidated figures for the entire three years of the New Hampshire Sweepstakes operation show the following distribution of prize winners: Massachusetts—28%; New Hampshire—17%; New York—16%; New Jersey—10%. Remaining 29% divided among 41 States, 7 foreign countries, and the District of Columbia. This analysis is wholly predictable on the basis of normal New Hampshire commercial and tourist travel. News Release, New Hampshire Sweepstakes Commission, September 22, 1966.

[43] Opinion of Attorney General to Honorable Robert W. MacDonald, Commissioner of Public Safety, dated September 9, 1964, to be published in Commonwealth of Massachusetts Public Document No. 12, *Report of Attorney General for Year Ending June 30, 1965.*

[44] One of the questions asked of Attorney General Brooke was whether purchasing numerous New Hampshire Sweepstakes tickets for others and bringing back the acknowledgments violated Massachusetts law. The ruling states: "Therefore, section 17 does not apply to the casual arrangement by which an individual may volunteer to purchase a chance on the Sweepstakes for a friend. It can be invoked, however, against a professional gambler who sets up a place of business or has records and apparatus in his possession which enable him to deal in and profit by such transactions. Should the activity referred to in question #4 be carried on by persons with the type of apparatus, records and place of business specified in section 17, such activity will constitute a criminal offense under the statute." *Id.*

all modern gambling legislation, including the federal statutes and the law of New Hampshire.

The Government's contention [45] that appellee's alleged activities would now be a violation of New Hampshire law is erroneous. Like the federal law on which the Government relies, the New Hampshire Sweepstakes statute prohibits unauthorized persons from engaging in the *business* of purchasing or offering to purchase sweepstakes tickets for others for a fee or service charge.[46] It does not prohibit the casual purchase of tickets for others, even if a fee is charged. It requires proof of a continuing course of conduct in order to bring the activity within the prohibition of the New Hampshire statute. This amendment to the original New Hampshire Sweepstakes law was patterned on the federal legislation of which Section 1953 is a part. The objective was exactly the same—to reach persons making a business of operating illegal wagering enterprises or conducting organized illegal activity.

Under N. H. Rev. Stat. Ann. 284:21-h, only two sweepstakes races per year may be held, both within the State of New Hampshire. This is hardly attractive to the gamblers who are running daily numbers, policy and bolita drawings. It is commercially impossible for racketeers to set up a wagering enter-

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[45] Brief for the United States, p. 19.

[46] N. H. Rev. Stat. Ann. 284:21-O, Purchase of Tickets for a Fee Prohibited. No person shall engage in the business of purchasing or offering to purchase a sweepstakes ticket or tickets for, in behalf of, or in the name of another for a fee or service charge which shall make the ultimate cost of such ticket or tickets to the registered owner thereof greater than the legal price of such ticket or tickets as established by the sweepstakes commission under the authority of this subdivision. Whoever violates the provisions of this section shall be fined not more than five hundred dollars, or imprisoned not more than one year, or both.

prise in other States which would traffic in New Hampshire Sweepstakes tickets. The tickets must be purchased within the State of New Hampshire. Three dollars must be paid for each one. A name and address must be obtained in advance for each ticket. The State of New Hampshire keeps the entire profit after prizes and administrative costs. The most that an organized business could hope to gross would be fifty cents to one dollar per ticket, and this would hardly cover the cost of the service rendered.

The instant case illustrates the realities of the situation. It is 600 miles round trip between Elmira, New York and Keene, New Hampshire. A payment of one dollar for each ticket purchased would produce gross income insufficient to cover the time involved plus the cost of travel. No such illegal gambling enterprise can exist. The nemesis would be the laws of economics, not 18 U.S.C. 1953.

CONCLUSION

For the foregoing reasons, we respectfully submit that this court should affirm the judgment below that the activity charged in the indictment does not come within the purpose of 18 U.S.C. 1953.

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